DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS

No. 3926 Equity

FRANKLIN PROCESS CO.

v.

HOOSAC MILLS CORP.

OPINION

October 19, 1934

Brewster, J. The receivers of the Hoosac Mills Corp. have presented to this court a report on a claim of the United States for $81,694.28, representing a balance due on the processing and floor stock taxes assessed pursuant to sections 9 and 16 of the Act of May 12, 1933, known as the Agricultural Adjustment Act. The receivers recommended that this claim be disallowed, and ask that the report be approved.

The report brings into question the validity of the tax. The matter was heard on evidence submitted by the government, oral arguments and briefs. The evidence was largely received over the objections of the receivers, and so far as it or the arguments of both parties relate to the occasion for, the expediency of, or the results, beneficial or otherwise, of the Agricultural Adjustment Act, they must be disregarded, except as they tend to disclose the factual grounds upon which Congress proceeded in its declaration of an emergency and of a legislative policy, and the Secretary of Agriculture proceeded in executing that policy. It can here be said, as was stated by Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U.S., 398, at page 444, that "The declarations of the existence of this emergency by the legislature * * * * cannot be regarded as a subterfuge or as lacking in adequate basis * * * The finding of the legislature * * * * has support in the facts of which we take judicial notice."

The facts controlling upon the issues presented may be briefly stated as follows:

On July 14, 1933, with the approval of the President, the Secretary of Agriculture promulgated a regulation which in part provided as follows:

> "I do hereby ascertain and prescribe that for the purpose of said Act the first marketing year for cotton shall begin August 1, 1933.
>
> I do hereby determine as of August 1, 1933, that the processing tax on the first domestic processing of cotton shall be at the rate of 4.2 cents per pound of lint cotton, net weight, which rate equals the difference between the current average farm price for cotton and the fair exchange value of cotton, which price and value, both as defined in

said Act, have been ascertained by me from available statistics of the Department of Agriculture."

The prescribed marketing year was consistent with the cotton year recognized by the Department of Agriculture, the Department of Commerce, private agencies in the United States and foreign countries, as well as by earlier congressional act. The rate of the tax was based upon reports and statistics gathered by the Department of Agriculture in accordance with the established practices from which were computed averages (1) of farm prices of cotton during the period August, 1909-July, 1914 (12.4 cents per pound), and (2) of the farm prices of cotton on June 15, 1933 (8.7 cents per pound), and also an index of prices paid by farmers for commodities which they bought (103%). Thus from the available statistics in the Department of Agriculture, the Secretary of Agriculture ascertained the "current average farm price" and "the fair exchange value" of the commodity involved. He determined the rate at which the processing and floor stock tax was to be levied, and thereupon proceeded to fix the rate of taxes at 4.2 cents per pound.

The Hoosac Mills Corp. is a processor of cotton, and had, or the receivers had, filed returns showing liability for the processing tax under section 9 of the Agricultural Adjustment Act for August, September and October, 1933, and showing the floor stock tax for August, 1933. There is no dispute regarding the amount of the balance due on account of this tax liability.

The question whether the claim for these taxes can be recognized as a valid claim turns upon the constitutionality of Title I of the Agricultural Adjustment Act. The Act, in part, is entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency." The title contains a declaration of emergency and a declaration of legislative policy which are set forth in the following language:

> "TITLE I - AGRICULTURAL ADJUSTMENT - Declaration of Emergency. That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of supporting the national credit structure, it is hereby declared that these conditions in the basis industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.
>
> Declaration of Policy.
>
> Sec. 2. It is hereby declared to be the policy of Congress- (1) To establish and maintain such balance between the pro-

duction and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.
(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.
(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

For present purposes the following summary of the provision of the Act may be deemed adequate:

Part 2 of the Title confers upon the Secretary of Agriculture "in order to effectuate the declared policy" power to provide for crop reduction and benefit payments with respect to basic agricultural commodities through "agreements with producers and other voluntary methods" (Sec. 8(1)).

To enter into marketing agreements with persons or associations "engaged in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof." (Sec. 8(2)); and to issue licenses to persons or associations so engaged (Sec. 8(3,4)), the licenses being subject to terms and conditions compatible with statutes which might be necessary to eliminate unfair practices or charges which tended to prevent the effectuation of the declared policy.

The Act further provides that in order "to obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes" as provided in the Act. When the Secretary of Agriculture determines that benefit payments are to be made, he shall proclaim such determination and a processing tax shall be in affect from the beginning of the next marketing year. The tax is levied on the first domestic processing of the commodity and is to be paid by the producer. The rate of the tax is fixed by the Secretary of Agriculture, but it must conform to the requirements of sub-section b of section 9, and is to be determined as of the effective date of the tax. The rate must be adjusted from time to time to conform to the requirements of the statute at such intervals as the Secretary may deem necessary to effectuate the declared policy (Sec. 9(a).

Sub-section b of section 9 is in the following terms:

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the

commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. * * * *"

Sub-section c provides that for the purposes of the Title the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period, namely, August, 1909-July, 1914. Cotton and any regional or market classification, type, or grade thereof, is included in the term "basis agricultural commodity" (sec.11), and in case of cotton the term "processing" means the spinning, manufacturing or other processing except ginning of cotton. (sec 9(d)(2)).

The Act appropriated in addition to the $100,000,000 out of other money in the treasury "the proceeds derived from all taxes imposed by" Title I of the Act "to be available to the Secretary of Agriculture for expansion of markets, removal of surplus agricultural products, administration expenses, rentals, and benefit payments and refund on taxes. The tax may be abated or refunded if the Secretary of Agriculture shall certify that the effect of the tax is to substantially reduce consumption and increase the surplus of the commodity (sec. 15(a)). The tax on products processed for exportation may also be refunded (sec. 17(2)). If the Secretary determines that the tax is causing or will cause to the processor disadvantages in competition, he may by proclamation, specify the competing commodity and the rate of the compensating tax necessary to prevent such disadvantages in competition (sec. 15(d)). A compensating tax is also levied on imported articles processed from commodities to which the Act relates (sec. 15 (e)). The determination of the Secretary upon the effect of the Act is made only after due notice and hearing.

The Act provides for a floor stock tax on sales, or other disposition of articles already processed which are held for sale at the time the processing tax takes effect. When the Act ceases to be effective there is a refund with respect to processed articles held for sale or distribution at the time of the termination of the Act.

Two underlying issues are presented. They are (1) whether the processing tax and the floor stock tax are valid impositions, and (2) whether the proceeds of the tax are appropriated for constitutional purposes. The issue, as I see it, is a broad one. It comprehends an inquiry into not only the scope of the taxing powers of Congress, but also into the powers of the Federal government to regulate the production and the prices of basis agricultural commodities.

First: The receivers contend that the taxes are not lawful, because they are direct taxes and not apportioned, or if they be regarded as excises they do not meet the requirements of uniformity.

The processing tax is clearly a tax upon the exercise of a particular use of property, namely, the privilege of manufacturing or otherwise processing a commodity. The tax conforms to that class of taxes upheld as proper excise taxes in the Supreme Court. Knowlton v. Moore, 178 U.S. 41, 48; Bromley v. McCaughn, 280 U.S. 124; Patton v. Brady, 184 U.S. 608; McCray v. United States, 195 U.S. 27; Nicol v. Ames, 173 U.S. 509. With respect to the floor tax, the nature of the tax is not so clearly defined because of the ambiguity in the language of section 16. (Section 16(a) provides that upon the sale or other disposition of any article processed from any commodity, with respect to which a processing tax is to be levied, which is "held for sale or other disposition" when the processing tax first takes effect, or when it is wholly terminated, by any person, there shall be made a tax adjustment according to subsections 1 and 2. Sub-section (1) fixes the rate of the tax, and also provides that "Whenever the processing tax first takes effect, there shall be levied, assessed and collected" the tax. Sub-section (a) provides for a tax adjustment when the sale is made, and (a(1)) provides that the tax shall be assessed when the processing tax takes effect. This apparent conflict can be reconciled by construing (a(1)) as merely fixing the time when the floor stock tax takes effect and the rate of the tax. This would be consistent with (a(2)) which fixes the time when the floor stock tax shall cease to operate. It obviously was the legislative intention that the two taxes should operate contemporaneously. (a(1)) sets out the method of adjustment as to goods on hand when the law becomes effective, and (a(2)) the method of adjustment as to goods on hand when the law ceases to be effective. In both instances, the adjustment is to be made "upon the sale or other disposition of the article." While this interpretation is not entirely free from doubt, it is to be favored, because the tax can then be treated as a tax imposed on the sale or other disposition of property, and therefore capable of being sustained as an excise. If it is held to be a tax levied or collected because of the general ownership of property, the tax would be a direct tax and fail, because it was not apportioned. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, Dawson v. Ky Distillaries Co., 255 U.S. 288. If reasonably possible, that construction will be adopted which upholds the constitutionality of the Act. Plymouth Coal Co. v. Penn., 232 U.S. 531; Buttfield v. Stranahan, 192 U.S. 470; Nicol v. Ames, supra.

If the tax be deemed to be one imposed upon the holding of the article for sale or other disposition, I can see no distinction in principle between the floor stock tax and the excise, considered in the case of Patton v. Brady, 184 U.S. 608, and it comes within the definition of an excise adopted in Bromley v. Mccaughn, supra. where the court remarked:

> "This Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned."

The receivers argue that the tax does not comply with the requirements of section 8 of Article 1 of the Constitution, that all excises shall be uniform throughout the United States. The argument is based upon the provisions of Section 11, which authorizes the Secretary of Agriculture to exclude from the operation of the Act any basic commodity or any regional classification thereof. They say that if the power is exercised a commodity from one part of the United

States may be subject to the Act, while the same commodity from another section would not be. "But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states." Mr. Justice White in Knowlton v. Moore, supra; Gottlieb v. White, 1 Fed. Supp. 907; affirmed 69 Fed.(2) 792. The tax meets this test of uniformity. Every processor of the commodity, wherever it may have originated, would be liable to the same tax upon that particular commodity or classification thereof. If the commodity happened to fall within the class of excluded commodities, the Act would not operate upon the processing of it, and no tax could be imposed.

Second: The constitutionality of the Act is assailed, upon the ground that it unlawfully delegates legislative power to the executive branch of the government. There are those who question whether the earlier accepted doctrine of the separation of powers of the government has today sufficient vitality to render it an adequate basis for setting aside an Act of Congress on that ground. Modern writers refer to the doctrine as merely on "American primitive" or a constitutional dogma for which Montasquieu is held responsible, because he once said that the English people owed their liberty to the separation of governmental functions. Whether it is an "American primitive" or a dogma of foreign origin, it was recognized by Chief Justice Marshall in Jayman v. Southard, 10 Wheat. 1. In Field v. Clark, 143 U.S. 649, the doctrine was deemed "vital to the integrity and maintenance of the system of government ordained by the Constitution." See Kilbourn v. Thompson, 103 U.S. 168; Union Bridge Co. v. United States, 204 U.S. 364, 381; J. W. Hampton v. United States, 276 U.S. 394; Mass. v. Mellon, 262 U.S. 447; O'Donoghue v. United States, 289 U.S. 516. There has, nevertheless, developed in the United States a marked tendency, which has attained considerable momentum during the last two years, toward the extension of fields of governmental activities, and hand in hand with this tendency has gone ever-increasing power to administrative officers to perform functions not strictly administrative but which partake of the character of legislative or judicial functions. Bureaus have been created with authority to interfere with the affairs of the individual. Regulations and executive orders with the force of law have been promulgated and have been upheld, even where a violation resulted in a penalty. United States v. Grimaud, 220 U.S. 506. The result of this tendency has been a vast accumulation of administrative las, so-called, applied by boards, commissions and officials. (See Report of the Special Committee on Administrative Law to the Bar Association submitted at the 57th Annual Meeting). The drift is not peculiar to the United States. The courts of England have given serious consideration to the growing mass of administrative law in that country. Some five years ago the Lord Chancellor referred to a committee the duty of considering "The powers exercised by or under the direction of (or by persons or bodies appointed especially by) Ministers of the Crown by way of (a) delegated legislation * * * * and to report what safeguards are desirable or necessary to secure the constitutional principles of the soverignty of Parliament and the rule of law." See Administrative Law in England, Iowa Law Review, Vo. XVIII p. 160.

It is significent, however, that up to the present time no act of Congress, so far as I am aware, has been held invalid, because it conferred legislative powers upon an executive or administrative officer, though several acts

have been attacked on this ground. Thus the President's authority to suspend for such time as he should deem just the provisions of the Tariff Act of 1890 relating to the free introduction of certain commodities was upheld in Field v. Clark, supra. The Secretary of the Treasury was held to be lawfully authorized to establish standards to govern in the importation of teas, and to forbid importation which did not come up to the fixed standard. Buttfield v. Stranahan, 192 U.S. 470. The court has also sustained an act authorizing the Interstate Commerce Commission to designate standard weights and maximum variation of drawbars for freight cars. St Louis & Iron Mt. R.R. v. Taylor, 210 U.S. 281, and likewise an act giving the President power to change rates under flexible tariff provisions. J. A. Hampton v. United States, supra. For other cases upholding the delegation of authority involving the exercise of powers of a legislative character, see Erhardt v. Boaro, 113 U.S. 537; Avent v. United States, 266 U.S. 127; United States v. Grimaud, supra; United States v. Atchison T. & S.F. R.R. Co., 234 U.S. 476; Union Bridge Co. v. United States, 204 U.S. 364; Ryan v. Amazon Petroleum Corp. 71 Fed.(2) 1; Williamsport Wire Rope Co. v. United States, 277 U.S. 551; Bleir v. Osterlein, 275 U.S. 220; Heiner v. Diamond Alkeli Co., 288 U.S. 502; United States v. Shreveport Grain Co., 287 U.S. 77; F.F. Peterson Baking Co. v. Bryan, 290 U.S. 570.

These cases demonstrate that when Congress has gone as far as it reasonably can in declaring a policy, and the means to accomplish the end sought, leaving to administrative officers the filling in of details, the statute will very likely be upheld, even if no definite standard has been established, and though the functions are legislative in character.

In the light of the foregoing, it is necessary to consider the authority conferred upon the Secretary of Agriculture by Title I of the Agricultural Adjustment Act. The Congress declared a policy which had for its objective the raising of the price level of agricultural commodities and restoring the purchasing power of such commodities to that which obtained in the prewar period, 1909-1914. To that end, it authorized the Secretary to enter into agreements with producers to reduce production of certain specified basic agricultural products, to enter into marketing agreements with producers, to issue licenses permitting processors and associations of producers to engage in the handling in interstate commerce of agricultural commodities, upon such terms and conditions consistant with acts of Congress as the Secretary might deem necessary to eliminate unfair practices or charges that would tend to prevent the effective accomplishment of the declared policy or hinder the restoration of normal economic conditions. This program outlined by Congress necessarily involved the expenditure of large sums of money for benefit payments and for other purposes. To meet, in part at least, these expenditures, Congress saw fit to impose an excise on processing of certain basic agricultural products. It laid down a formula by which the rate of the tax was to be determined, and prescribed the source from which the Secretary should derive his data in applying the formula. The Act leaves it with the Secretary to determine what basic commodities or classifications thereof should be brought under the Act, and to fix the time when the tax provisions should become effective, and when they should cease to operate.

It also in section 9(b), permits the Secretary to fix a rate which may not conform to the formula. There is a provision that if the Secretary has reason to believe that the rate will reduce the consumption, so as to result in a surplus of the commodity, or depress farm prices, he shall cause an in-

vestigation to be made, and if he finds that these results will occur, the rate then is to be such as will prevent such surplus or depression of prices. Obviously, the Secretary furnishes his own standard of what is required by these provisions. If Congress in its wisdom deemed it expedient to introduce into the legislation flexible provisions in order that a strict application may not defeat the intended end, it is doing no more than it has done in earlier tax legislation. Certain provisions of the Internal Revenue Act may be cited as illustrations:

Section 327, 328 of the Revenue Act of 1918 and 1921; Williamsport v. United States, supra; Heiner v. Diamond Alkali Co., supra; Blair v. Osterlein, Supra.

The question arises, therefore, whether it can fairly be said respecting the Act that Congress, and not the Secretary, has imposed the tax, and having gone as far as it reasonably can in forwarding the avowed policy of the legislation, has conferred upon the Secretary merely discretionary authority to be exercised only in the execution of the law.

The formula for fixing the rate of taxes is somewhat indefinite. Statistics of the Department of Agriculture at best are only averages obtained from variable factors subject to different interpretations. The discretion to fix the rate, regardless of the formula, and to decide when and on what commodities a processing tax shall be levied, would seem to lodge with the Secretary power to impose taxes, - a power which the Constitution placed with the legislative branch. It must, I think, be conceded that legislative functions are conferred upon administrative officers by the Act. But whether there has been an unlawful delegation of power is to be doubted upon the authorities. The courts have not as yet clearly defined the line between lawful and unlawful delegation of legislative power. While the Agricultural Adjustment Act would seem to come near the line, it would be presumptuous for this court to undertake to put the Act outside the circle of the Constitution in view of earlier acts already cited which have received the sanction of the Supreme Court. So far as we are concerned with the delegation of legislative authority I can see no sound distinction in principle between statutes imposing a duty of importation, and one imposing an excise on domestic manufactures.

Third: The receivers make the further contention that the tax is invalid because the Act constitutes an unlawful attempt to legislate outside the powers granted to Congress and within the field of State powers.

The government argues that the receivers, as tax-payers, cannot attack the validity of the tax by questioning the purposes for which they have been levied. If this issue involved only the legality of appropriations of proceeds of taxes lawfully exacted, the attack must necessarily fail. The course of history under the Constitution furnishes numerous instances where appropriations have been made for territorial expansion, to advance education, and to promote particular industries. Large appropriations have already been made to establish and maintain the Department of Agriculture and the varied activities of that Department. It is inconceivable that all these appropriations could have been illegal. Story in his work on the Constitution, sec. 991, says:

> "Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether these powers be construed in their broad or narrow sense."

But there is implicit in the issue something more than the power to appropriate public funds. While the statute (sec. 9) recites that the processing tax is to be levied"to obtain revenue for extraordinary expenses incurred by reason of the National Emergency Act," the Act, taken as a whole, leaves no doubt of the legislative intent to levy the tax for the purposes of defraying the expenses of administering the Act and paying the debts incurred for benefit payments, and rentals incident to the crop-reduction program.

The taxing power of Congress, while extemely broad, is not without its limitations, and one of these is that it shall be exercised for public uses as distinguished from private ends. Loan Association v. Topeka, 20 Wall. 655. In that case the court observed that,

> "Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose of object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited."

But the court adds that,

> "This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

And in this opinion taxes are defined as "burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

The Constitution has restricted the power to levy taxes to two purposes, namely, payment of debts of the United States, and to provide for the general welfare of the United States. This "general welfare" clause does not embody a specific grant of power. Jacobson v. Mass., 197 U.S. 11; Sherlock v. Alling, 93 U.S. 99. If, therefore, it should appear on the face of the Act that it was calculated to benefit only private interests, it would be the duty of the court, I take it, to declare the tax unlawful. It is not, however, within the province of the court to substitute its judgment for that of Congress upon the effect of a particular measure manifestly designed to promote the general welfare of the people of the United States. It is no objection that individuals will derive profit from the consummation of the legislative policy. Individuals benefit from every bounty, subsidy or pension provided for by statute, whether Federal or State. Compare United States v. Realty Co., 163 U.S. 427; Legal Tender Case, 79 U.S.

457; Mountain Timber Co. v. Washington, 243 U.S. 219, 238; Noble State Bank v. Haskell, 219 U.S. 104. Another rule affecting power of Congress to levy taxes is to be found in cases such as The Child Labor Tax Case, supra, and Hill v. Wallace, supra. This rule is that the law levying the tax must be a genuine revenue measure, and not one intended to operate merely as a penalty in order to "coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution." (Chief Justice Taft in Child Labor Tax, p.39). The Agricultural Adjustment Act does not offend in this respect. The principal purpose of the Act is to regiment the agricultural industry by regulating production of certain agricultural commodities. The tax is incidental to this main object. The power to tax is not being used to coerce compliance with regulations prescribed by the Secretary of Agriculture.

The tax, on the contrary, is laid to produce revenue which Congress has, by appropriation, put at the disposal of the administrative officer to be used for the purposes of the Act.

The third limitation is stated in the opinion of Veazie Bank v. Fenno, 6 Wall. 533 at 541, where it is said:

> "There are, indeed, certain virtual limitations (upon the taxing power) arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government* of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

It is necessary, therefore, to consider the purposes of the legislation in order to determine whether they are consistent with the granted powers.

The language employed in framing the Act clearly indicates a legislative intent to bring the powers exerted within the commerce clause of the Constitution. Section 8(2) and (3) of the Act, which deal with marketing agreements and licenses, by express terms limit the authority of the Secretary to deal only with those engaged in handling, in the course of interstate commerce, agricultural commodities. The provisions of section 8(1) relating to the reduction of acreage or production, and the payment of rental or benefits, are not so limited. But when read in connection with the declaration of an emergency it becomes apparent that the legislature sought to connect the power with interstate commerce by proceeding on the theory that "the acute economic emergency" which was partly the result of disparity between agricultural and other prices, destroying the purchasing power of farmers, gave rise to conditions in the basic industry of agriculture which affected transactions in agricultural commodities with the national public interest, and which burdened and obstructed the normal currents of commerce in such commodities. Whereupon Congress declared it to be its policy to restore farm prices to prewar levels, and to that and granted broad powers to the Secretary of Agriculture to enter upon a program which it was hoped would effectuate the policy and end the disparity. Here we note as ingenious attempt to bring this legislation within the scope of the powers conferred by the commerce clause.

We are, then, brought to an inquiry into the limitations which the courts have set about the commerce powers of the Congress. The grant is broad in its terms. The provisions of the grant have been accorded liberal interpretation, and within its proper scope it is said to be unlimited. The legislative motive in its exercise has been held to be "free from judicial suspicion and inquiry." (Chief Justice Taft in Child Labor Tax Case, supra, p. 39.)

It is necessary, however, to keep in mind the observation of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat, 416, 423, that Congress may not "under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government."

The development of the regulatory powers of Congress under the commerce clause presents an interesting study. The power was first applied to the instrumentalities of commerce. (Examples: Interstate Commerce Act; Employers' Liability Act.) The power has been exerted to prevent monopolies and restraints of trade. (Examples: Anti-Trust Laws, see Standard Oil of New Jersey v. United States, 221 U.S. 1). It was also extended to prohibit transportation in interstate commerce of certain subjects of traffic the transportation of which was deemed to be detrimental to the public welfare. (Lottery Case, Champion v. Ames, 188 U.S. 321).

But in Hammer v. Dagenhart, supra, it was held that the power could not be exercised to exclude from commerce articles inherently innocent.

This outline is sufficient to illustrate the marked tendency of Congress approved by the court, to centralize power in the Federal government by invoking the grant contained in the commerce clause.

There are, however, to be inferred from the cases limitations imposed upon the exercise of the commerce power. It cannot be applied to the regulation of the manufacture of goods even though intended for shipment in interstate commerce. United States v. E.C. McKnight, 156 U.S. 1; see also Hammer v. Dagenhart, supra; Utah Power & Light Co. v. Pfost, 286 U.S. 165; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129; Chassaniol v. Greenwood, 291, U.S. 584; nor to the mining of products. Delaware Lackawanna & Western R.R. Co. v. Yurkonis, 238 U.S. 439; Heisler v. Thomas Colliery Co., 260 U.S. 245; Oliver Iron Co. v. Lord, 262 U.S. 172. By the same token, the commerce powers, I take it, could not be extended to reach a crop of wheat or cotton, notwithstanding the farmer may have intended to introduce it into the channels of commerce. If, therefore, Congress had undertaken by coercive measures to regulate the amount of wheat or cotton a farmer should produce, a serious constitutional question would arise whether Congress had not extended the frontier of Federal bureaucratic activities too far. But, as has already been noted, the authority delegated to the Secretary of Agriculture by the first sub-division of section 8 cannot be brought to bear upon any one who does not voluntarily submit to it and this for a monetary consideration. The authority in the second sub-division also pre-supposes agreement between the Secretary on the one hand and processors and producers on the other. It is only in the third sub-division that the regulatory powers may be forced upon the individual against his will, and those powers are restricted in their application to those "engaged in the handling in the current of interstate and foreign commerce" of agricultural commodities.

As the matter comes before the court in the case at bar, my consideration is restricted to the law as it is written, and does not extend to the Law as it may be interpreted and applied by administrative officers acting under color of its provisions. It is conceivable that the power to license may be exercised through the imposition of conditions in such a way that the regulation would be beyond the scope of the legitimate powers of Congress under the commerce clause. Such result, however, is not to be presumed. Mountain Timber Co. v. Washington, supra; Prentis v. Atlantic Coast Line, 211, U.S. 210; Henderson Water Co. v. Corporation Commission, 269 U.S. 278; Lieberman v. Van De Carr, 199 U.S. 552; Doherty v. McAuliffe, 7 Fed. Supp. 49.

These cases also dispose of the contention of the receivers, - that the legislation is class legislation, imposing burdens upon one class for the benefit of another.

Furthermore, the Act was obviously enacted as an emergency measure, and as such it must be treated. Congress has declared that the conditions, which it aims to relieve by the measure, burden and obstruct the normal current of commerce in commodities. While in Hill v. Wallace, supra, the court refused to uphold the law involved, there was dicta in the opinion indicating that if Congress had from the evidence before it regarded that the sales for future delivery on a board of trade directly interferred with interstate commerce so as to be a burden or obstruction, the law would have been upheld on the doctrine of cases like United States v. Ferger, 250 U.S. 199; Stafford v. Wallace, 258 U.S. 485; Swift v. United States, 196 U.S. 375.

We have been recently told on the highest authority that an emergency does not create power, nor increase granted powers or diminish restrictions imposed upon powers granted or reserved; but that an emergency may furnish the occasion for the exercise of powers theretofore dormant. Home Loan Association v. Blaisdell, supra, A nationwide economic disturbance may create a condition which would bring the purposes of the legislation into relationship with commerce which would not exist under normal conditions, thereby furnishing an occasion for the exercise of the commerce powers which might not be legally exercised under more favorable economic conditions.

It may be objected that if the law is to stand as a constitutional enactment all limitations upon the power of the central government to regulate local and individual interests in a time of emergency would be effaced; that all Congress would have to do would be to declare a policy that the reduced purchasing power of any class of people burdened and obstructed the free flow of commerce. In fact, Congress has already enacted a National Industrial Recovery Act upon the declared policy that wide-spread unemployment has burdened or obstructed interstate commerce. This Act, at least as construed and administered, has been held unconstitutional in Hart Coal Corp. v. Sparke, 7 Fed. Supp. 16; United States v. Lieto, 6 Fed. Supp. 32; United States v. Mills, 7 Fed. Supp. 547.

The conclusions which I have reached are not necessarily in conflict with these cases, because I am dealing with an entirely different statute; and, as I have already indicated, I am concerned only with the statute and not with any regulatory act of an administrative officer.

Fourth: It is said that the statute cannot stand, because it denies to the taxpayer due process of law. In Nebbia v. New York, 291 U.S. 502, 525, it is stated "The Fifth Amendment, in the field of federal activity" does "not prohibit governmental regulation for the public welfare." It merely conditions "the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

I am unable to discern any ground upon which it can fairly be argued that the law imposing the processing, compensating, and floor taxes is arbitrary, unreasonable or capricious. Congress in its wisdom has seen fit to declare that the means selected have a substantial relation to the object sought to be attained. This declaration is not so wanting in substance as to warrant this court in treating it as a mere pretext.

Respecting the contention of the receivers, that the law is repugnant to the constitutional guarantees of a Republican form of government, it is only necessary to quote from the opinion in Mountain Timber Co. v. Washington, at page 234, where it is observed:

> "As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political quotation, committed to Congress and not to the courts."

The Agricultural Adjustment Act indubitably authorizes an executive to exercise powers of a legislative character. One may entertain doubts respecting the right of Congress to exert the powers which it has attempted in the Act. But probably no presumption is more thoroughly established than the presumption that an enactment by a legislative body does not transcent the powers possessed by that body. Erie R. Co. v. Williams, 233 U.S. 685, 699; Mountain Timber Co. v. Washington, supra; United States v. Cohen Grocery Co., 255 U.S. 81. This presumption is especially strong when the issue is raised in the District Court in a case involving a statute of great public importance and by virtue of which vast sums have already been expended and equally vast sums have already been levied upon the processors of agricultural products. See United States v. Suburban Motor Service Co., 5 Fed. Supp. 798; McCulloch v. Maryland, 4 Wheat. 315, 401.

In conclusion, I rule that the claim presented by the United States is a valid claim and should be allowed as such in these receivership proceedings.

Equity No. 3926

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS

Franklin Process Company.
v.
Hoosac Mills Corporation

Government Exhibit No. 3-1	Affidavit of Nils A. Olsen, verified on April 24, 1934.
Government Exhibit No. 3-2	Affidavit of Nils A. Olsen, verified on April 24, 1934.
Government Exhibit No. 3-3	Affidavit of Lawrence Myers, verified on April 24, 1934

Government Exhibit 3-1

DISTRICT OF COLUMBIA, SS:

Nils A. Olsen, being first duly sworn on oath according to law, deposes and says:

That he is at present Chief of the Bureau of Agricultural Economics of the United States Department of Agriculture; that he has been so engaged since July 17, 1928; that from May 1, 1925, to July 16, 1928, he was Assistant Chief of the Bureau of Agricultural Economics, in charge of Research; that he has been on the staff of the United States Department of Agriculture since November 3, 1919.

That the Department of Agriculture has collected current average farm prices of crops at monthly intervals since January, 1903, and has published this material since February, 1908; that the Bureau of Agricultural Economics of the Department of Agriculture is at present in charge of this work and has been since the formation of that Bureau in 1931; that data on farm prices of cotton have been collected since January, 1908, and published monthly since March, 1908; that this price recording service covers the following commodities:

1. Corn
2. Wheat
   a. Winter Wheat
   b. Spring Wheat
      (1) Durum Wheat
      (2) Spring Wheat other than durum
3. Oats
4. Barley
5. Rye
6. Grain Sorghums
7. Buckwheat
8. Flaxseed
9. Cotton
10. Cottonseed
11. Potatoes
12. Sweet Potatoes
13. Beans, dry, edible
14. Peanuts
15. Soybeans
16. Cowpeas
17. Tobacco
18. Hogs
19. Cattle
20. Calves
21. Sheep
22. Lambs
23. Milk Cows
24. Horses
25. Mules
26. Chickens
27. Turkeys
28. Eggs
29. Butter
30. Butterfat
31. Milk (Retail)
32. Milk (Wholesale)
33. Wool
34. Apples
35. Pears
36. All Hay
37. Alfalfa Hay
38. Clover Hay
39. Timothy Hay
40. Mixed Clover and Timothy Hay
41. Prairie Hay
42. Alfalfa Seed
43. Red Clover Seed
44. Sweet Clover Seed
45. Timothy Seed

that Appendix I are samples of schedule sheets for prices paid to producers sent out to reporters by the Department of Agriculture, covering commodities

on which price reports are obtained (the nature of the schedules sent out depends on the section of the country to which they are sent); that all of the forty-eight states are covered by the reports for all commodities; that individual monthly averages of prices are reported for sixteen states on cotton; that as further illustrating the scope of this service, 11,493 price report schedules were returned by special price correspondents in reply to the inquiry concerning prices as of March 15, 1934, 1498 of these schedules for March, 1934, showing the current average farm price of cotton; that the average prices for these commodities are computed in the following manner:

> Straight arithmetic averages of the individual price reports are computed for each crop reporting district within the State. Weighted averages of these reporting district averages are then calculated for the State as a whole. Available production statistics are utilized as weights. Monthly averages of prices for the United States are computed by weighting individual State averages with the production of the commodity in each State. The computation of yearly averages of prices in the United States involves two steps. First, State averages of prices for each month of the year are weighted with statistics on monthly marketings of the commodity concerned to obtain annual State averages. Second, these annual State averages are weighted by the production of the commodity concerned in each State during the current year to obtain a United States yearly average.

That the bases of the figures given in the column entitled "Five-year Average August 1909 to July 1914" and the column "June Average 1910 to 1914" are the same as the bases of the other columns giving current average farm prices for commodities; that current average farm prices of commodities receive widespread distribution and recognition. Mimeographed reports similar to the attached are sent to approximately 1,000 persons throughout the United States. 200 of these reports are furnished each month to the press. The report is printed in "Crops and Markets" which is distributed to approximately 12,500 persons each month; members of Congress have made extensive use of these farm prices of commodities in the past. For example, these data were employed as basic information in the investigation conducted by a sub-committee for the Senate Committee on Agriculture in the winter of 1931 in regard to the determination of the reasons for the failure of the price of bread to reflect the decline in the price of wheat and flour and similar investigations in regard to milk, other dairy products, meat and meat food products.

That a copy of the mimeographed report showing "average prices received by farmers for farm products, June 15, 1933, with comparisons," issued by the Crop Reporting Board of the Bureau of Agricultural Economics of the United States Department of Agriculture at Washington, D. C., on June 27, 1933, is attached hereto, and made a part hereof and marked Appendix 2; that the latest statistics available to the Secretary of Agriculture on July 14, 1933, were these prices as of June 15, 1933; that the schedules on which the report of June 15, 1933, farm prices were based were sent out by the Department of Agriculture during the period June 11-13, 1933; that these schedules were returned to the Department during the period June 16-19, 1933; that average prices as of June 15, 1933, were published on June 27, 1933; that the method

used in arriving at the average price of cotton on June 15, 1933, was the same as the method used in arriving at the corresponding figures for previous months; that the current average farm price of cotton as of June 15, 1933, was 8.7 cents per pound; that the average farm price of cotton during the pre-war period August 1909 to July 1914 was 12.4 cents per pound; that the United States Department of Agriculture has no other statistics which could be confused with the foregoing for the purpose of determining the difference between the current average farm price of cotton and the fair exchange value of cotton, "the price therefor that will give" cotton "the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period," August 1909 - July 1914.

The Department of Agriculture has collected information on prices of articles farmers buy for the period since 1909 and published the index of prices based on this information in August, 1928; that since August, 1928, this information has been collected and published at quarterly intervals; that this information is obtained by questionnaires sent to special price correspondents at regular periods; copies of such questionnaires, showing the numerous articles under the headings of clothing, food, household articles, furniture, floor coverings, building material, fencing material, fuel, equipment, supplies, machinery, feed, seed and fertilizer covered by the surver, are attached as Appendix 3; that such statistics so compiled cover all forty-eight states; that for the survey of September 15, 1933, 6,844 individual schedules of prices farmers pay were tabulated.

That the index of prices farmers pay is computed in the following manner:

A simple average of the prices of different commodities from reporters is obtained for each State and an average for the United States is obtained by weighting the State averages according to the amount of a commodity ordinarily bought by farmers in each State. The index number for each group of commodities is then computed by weighting the price of each commodity for any period of time by an annual average of the amount of these goods purchased by farmers during the years 1924-1929. These weighted prices are then combined into an aggregate and the aggregate for each period of time divided by the average of the aggregate for the period 1910-1914, thus giving an index number showing the value of a fixed bill of goods at any period of time as a percentage of the value of this same bill of goods during the years 1910-1914. Thus, if fixed amounts of the commodities bought by farmers are combined in proportion to farmer purchases of each and were worth an average of $100,000 during the base period 1910 to 1914, while the same amounts of the same combination of articles were worth $120,000 on March 15, 1934, the index of prices farmers pay would be 120 for March 15, 1934, as compared with 100 during the 5-year pre-war base period, since the aggregate value of these commodity purchases on March 15, 1934, was 120 per cent of, or 20 per cent higher than the average aggregate value of the same commodities during the 5 years 1910-1914.

That the latest figures relative to prices of articles farmers buy that were available in the Department of Agriculture on July 14, 1933, were the figures relating to June 15, 1933; that the schedules upon which prices

as of June 15, 1933, were reported by voluntary correspondents of the Department of Agriculture were sent out during the five days from June 9 to June 13, 1933, that these schedules were returned to and received again by the Department of Agriculture during the 6 days from June 16 to June 21, 1933; that the method used in arriving at the index of prices of articles farmers buy as of June 15, 1933, was the same as the method used in arriving at the index of prices of articles farmers buy in previous quarters; that the monthly indexes of prices farmers pay for the months intervening between quarterly inquiries represent straight interpolations between the quarterly indexes; that the latest index of prices of articles farmers buy that was available up to July 14, 1933, was published on June 27, 1933; that the index of prices of articles farmers buy is shown on pages 1 and 7 of the publication showing prices received by farmers; that the index of prices of articles farmers buy was 103 on June 15, 1933; that the average index for the pre-war period, August 1909 to July 1914 equals 100; that data used in the construction of the index during that period were collected only once a year; that the average of the annual inquiries from 1910 to 1914 was taken to represent the pre-war period, August 1909 to July 1914; that these are the only statistics of the Department of Agriculture that are "available statistics of the Department of Agriculture with respect to articles farmers buy" for use in calculating the purchasing power of agricultural commodities; that there is attached hereto and made a part hereof Appendix 4, a publication of the Department of Agriculture of June , 1933, "Index Numbers of Prices Farmers Pay for Commodities Purchased;" that the index of prices of articles farmers buy received widespread distribution; that it is published in the same mimeographed reports and issues of "Crops and Markets" as the prices received by farmers for agricultural products and is widely used; that members of Congress have made use of this index of prices farmers pay in the past.

That the monthly publication of the Bureau of Agricultural Economics containing statistics of current average farm prices received by farmers, and index numbers of prices farmers pay, above described, a monthly issue of which is annexed hereto as Appendix 2, is the only study of its kind compiled and published by the Department of Agriculture; and the prices and index numbers contained therein are the official figures used by the Department of Agriculture.

(Signed) Nils A. Olsen
Nils A. Olsen,
Chief, Bureau of Agricultural Economics,
United States Department of Agriculture.

I, Nils A. Olsen, being duly sworn, depose and say that I have read the foregoing statement by me subscribed; that the statements therein based on personal knowledge are true, and the statements contained therein based on information and belief, including information coming to me in my official capacity, I verily believe to be true.

(Signed) Nils A. Olsen
Nils A Olsen,
Chief, Bureau of Agricultural Economics,
United States Department of Agriculture.

Subscribed and sworn to before me this 24th day of April, 1934.

/s/Wilfred M. Richardson
Notary Public, in and for the District
of Columbia.

392 C Eq.
Ex 3
JEG Jr.
4/30/34

Government Exhibit 3-2

DISTRICT OF COLUMBIA, SS:

Nils A. Olsen, being first duly sworn on oath according to law, deposes and says:

That he is at present Chief of the Bureau of Agricultural Economics of the United States Department of Agriculture; that he has been so engaged since July 17, 1928; that from May 1, 1925 to July 16, 1928, he was Assistant Chief of the Bureau of Agricultural Economics, in Charge of Research; that he has been on the staff of the United States Department of Agriculture since November 3, 1919.

That cotton is sold in the United States on a gross weight basis, with the exception of American-Egyptian cotton and cotton packed in round bales; that cotton is sold to Southern Mills under the Southern Mill Rules of 1925, Rul vii (a) of these Rules specifying that on uncompressed cotton the tare shall not exceed 4.4 percent, and on compressed cotton the tare shall not exceed 4.8 percent, that based on the 500-pound gross weight bale, the tare allowance in the case of uncompressed bales is 22 pounds, and on compressed bales, 24 pounds; that cotton is sold to Northern Mills on New England Terms, Section 55 of these terms specifying that the allowance for tare shall be 4.8 percent of the invoice weight; that the allowance used is therefore 24 pounds of tare to a 500-pound gross weight bale; that the tare of a so-called "square" bale of cotton consists of the combined weight of bagging, ties and patches used in covering the bales; that the tare of a so-called "round" bale of cotton consists of the burlap used in covering the bale.

That data collected by the Bureau of Agricultural Economics of the United States Department of Agriculture for the 1930-1931 crop indicates that the average weight of tare on the so-called "square" bale as turned out at the gin was approximately 21 pounds; that the average gross weight of these bales as reported by the Bureau of Census was 506.4 pounds for the same season; that at the time of compressing "square" bales to greater density the weight of tare usually is increased by the addition of patches; the weight of patching material applied varies from 2 to 9 pounds per bale; the average weight of tare on two "round" bales having a combined weight of 500 pounds is 5 pounds; that the range in weight of tare for "square" bales as turned out at the gin is from 13 1/2 pounds to 30 pounds; that according to the information of the Bureau of Agricultural Economics, the weight of tare on the "round" bale is uniformly 2 1/2 pounds.

/s/ Nils A. Olsen
Nils A. Olsen, Chief, Bureau
of Agricultural Economics,
U.S. Department of Agriculture.

I, Nils A. Olsen, being duly sworn, depose and say that I have read the foregoing statement by me subscribed; that the statements therein based on personal knowledge are true, and the statements contained therein based on information and belief, including information coming to me in my official capacity, I verily believe to be true.

Nils A. Olsen
Nils A. Olsen, Chief, Bureau of Agricultural Economics, U. S. Department of Agriculture.

Subscribed and sworn to before me this 24th day of April, 1934.

Wilfred M. Richardson
Notary Public, in and for the District of Columbia.

Government Exhibit 3-3

DISTRICT OF COLUMBIA, SS:

Lawrence Myers, being duly sworn under oath according to law deposes and says:

That he is at present Acting Chief of the Cotton Processing and Marketing Section of the Agricultural Adjustment Administration, United States Department of Agriculture; that he has been so engaged since January 2, 1934; that from July 1, 1933, to January 1,1934 he was Economic Advisor to the Agricultural Adjustment Administration and assigned to work on cotton; that from July 1, 1927, to June 30, 1933, he was on the staff of the Bureau of Agricultural Economics of the United States Department of Agriculture, during which time he gave his principal attention to cotton economics and statistics, and that at the time of his appointment as Economic Advisor to the Agricultural Adjustment Administration he was serving as a senior agricultural economist in the Bureau of Agricultural Economics, United States Department of Agriculture:

That the marketing year for cotton in the United States is taken to begin on August 1 of each calendar year; that August 1 has been taken as the beginning of the cotton marketing year since 1914, when by general acceptance the date of the beginning of the marketing year was changed from September 1 to August 1, in order to adjust the statistical year to the seasonal trend of cotton movement and of market supplies; that the date August 1 immediately precedes the time that the new crop starts to move in volume; that some new cotton crop moves as early as June and ginnings uniformly get under way in the extreme southern portions of the Cotton Belt in the United States in July, but prior to August 16, ginnings are comparatively small and in only two of the nine years immediately preceding August 1, 1933, did ginnings up to August 16 exceed five hundred thousand (500,000) bales; that August 1 is the date used in calculating the annual carryover of unmanufactured cotton and is taken as the beginning of the year in calculations of annual consumption and supplies and for similar statistical calculations, except for special purposes; that August 1 is accepted as the beginning of the cotton marketing year in United States by governmental agencies, such as the United States Department of Agriculture and the United States Department of Commerce, and by private agencies both in the United States and in foreign countries; that the cotton marketing year is recognized by members of Congress from the Cotton Belt to begin August 1, as evidenced by members' speeches contained in the Congressional Record; that August 1 is recognized as the beginning of the cotton marketing year in An Act Authorizing the Secretary of Agriculture to Collect and Publish Statistics of the Grade and Staple Length of Cotton, Publish - No. 704 - 69 Congress, S4746, as follows: " - - - the Secretary of Agriculture - - - is hereby authorized and directed to collect and publish annually, on dates to be announced by him, statistics or estimates concerning the grades and staple length of stocks of cotton, known as the carryover, on hand the first of August of each year - -."

(Signed) Lawrence Myers

Lawrence Myers

Acting Chief of the Cotton Processing and marketing section, Agricultural Adjustment Administration.

I, Lawrence Myers, being duly sworn, depose and say that I have read the foregoing statement by me subscribed; that the statements therein based on personal knowledge are true, and the statements contained therein based on information and belief, including information coming to me in my official capacity, I verily believe to be true.

/s/ Lawrence Myers
Lawrence Myers
Acting Chief of the Cotton Processing and Marketing Section, Agricultural Adjustment Administration.

Subscribed and sworn to before me this 24th day of April, 1934.

Wilfred M. Richardson.
Notary Public, in and for the District of Columbia.